IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Clarence E. Lewis,
Appellant,

vs.

The United States of America,
Appellee.

BRIEF OF APPELLEE.

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Appellant's opening brief raises two questions for consideration:

1. That the verdict is contrary to the law and the evidence;

2. That the evidence is insufficient as applied to the charge.

Taking these up in the order in which they appear we find first, that appellant was indicted for violation of the Harrison Narcotic Act in that he did "deal in and distribute certain narcotics without having registered and paid the special tax, etc., being then and there a person required to register and pay such special tax."

I.

Appellant complains that he was not a person required to register under the act, unless he could be considered a "retail dealer"; and that he was only charged with a sale of narcotics in count 2 of the indictment, on which count he was acquitted.

"Where the indictment charged that the defendants were persons required to register, and that they unlawfully had certain drugs in their possession, it is not necessary to negative an innocent possession by alleging that defendant's possession was for purpose of a sale."

U. S. v. O'Hara, 242 Fed. 749, T. D. 2392.

"The act applies to all sellers, not only to registered dealers."

Fyke v. U. S., 254 Fed. 225.

At this point it might be well to call the attention of the court to certain errors which are apparent in appellant's opening brief. In his statement of the case he alleges that one Morris (the police informant in the particular case) was a "notorious addict" [Trans. p. 6, l. 10], and also that appellant was an addict to the use of drugs [Trans. p. 6, l. 14 and p. 7, l. 2]. A careful reading of the transcript shows that there is no foundation for either of these statements, for there was absolutely no evidence submitted to the jury to support either of these allegations.

Conceding that mere possession alone of narcotics under the act is not a crime, yet if coupled with evi-

dence of dealing or distributing it does become an offence.

The act itself makes possession a presumption that such possessor is engaged in the business of dealing, and such presumption should be considered by the jury with all the other evidence in the case.

The Jin Fuey Moy case, 241 U. S. 402, is not in point for there defendant was charged with "possession" alone, and NOT with "dealing and distributing" in addition.

II.

The second question raised in appellant's brief, viz.: the insufficiency of the evidence as applied to the charge, can be answered point by point.

1. Appellant contends that the bare possession of narcotics is not presumptive evidence that the person is engaged in the business of dealer.

The act itself declares that "such control (possession) shall be presumptive evidence of a violation of this section (Sect. 8) and also a violation of the provisions of section 1 (forbidding dealing in and distributing)."

2. Appellant contends that the evidence fails to show any sale, and alleges that the court admits in its charge that there was no sale.

The testimony of the two police officers, who were witnesses for the government, was to the effect that informant went to appellant's home; that he had

marked money in his hand at the time of the arrest; (both of which points appellant admits) and that appellant had in his hands the package containing the narcotics. [Trans. p. 12, l. 3 *et seq.* and p. 33, l. 1 *et seq.*]

The court instructed the jury that no sale was consummated [Trans. p. 88, l. 3]; but did instruct them that "the evidence is to the point that he was *dealing* in narcotics." [Trans. p. 88, ll. 7-8.]

3. The point raised by appellant that no proof was introduced that the exhibits introduced were ever the property of the appellant, we deem too trivial to be worthy of consideration.

4. The question of "intent" has been settled by the Supreme Court in U. S. v. Ballint, decided March 27, 1922, #480, in which the opinion was rendered by Mr. Chief Justice Taft, holding that whether scienter is essential to statutory crime is a question of legislative intent; and that the sale of narcotics is an offence though the seller is ignorant of the character of the drug.

The appellant was fairly tried; the jury fairly and impartially instructed, and it is respectfully submitted that, there being no error in the record, the case should be affirmed.

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